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No. 834

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

CONTINENTAL OIL COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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IN THE

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v.

CONTINENTAL OIL COMPANY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

Appellee, Continental Oil Company, moves pursuant to Rule 16 of the Revised Rules of this Court:

First, to dismiss this appeal on the ground that Appellant deliberately failed to appeal as against a necessary and indispensable party — the defendant Hondo Oil and Gas Company—and thereby intentionally eliminated that party from this case.

Secondly, in the alternative, to affirm the judgment below on the ground that the questions on which decision of this cause depends are manifestly so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a judgment entered on September 27, 1963, in the United States District Court for the District of New Mexico (WALDO H. ROGERS, J.).

That judgment (a) granted a motion by the defendant Continental Oil Company for summary judgment and (b) dismissed the plaintiff's Amended Complaint as to both Continental Oil Company and its co-defendant, Hondo Oil and Gas Company. This appeal has been taken, however, only as against Continental; the Notice of Appeal states explicitly:

> "that plaintiff United States of America hereby appeals to the Supreme Court of the United States from that part of the judgment entered in this action on September 27, 1963, granting defendant Continental Oil Company's Motion for Summary Judgment and dismissing the Complaint against it. *Plaintiff does not appeal from the judgment insofar as it dismisses the complaint against the defendant Hondo Oil and Gas Company.*
>
> "This appeal is taken pursuant to 15 U.S.C 29." (Emphasis supplied)

This action, filed in May 1961, attacked a business transaction which had been concluded two years earlier, on May 1, 1959, between Continental Oil Company ("Continental") and Malco Refineries, Inc. ("Malco"). The transaction consisted, essentially, of Continental's leasing of Malco's oil refinery at Artesia, New Mexico, for a term of 20 years. Asserting that the lease arrangement contravened the "anti-merger" provisions of Section 7 of the Clayton Act (15 U.S. Code § 18), Appellant prayed for a judgment compelling Continental to divest itself of the Malco refinery.

Shortly after the action was started, Continental moved, under Rules 19 and 21 of the Federal Rules of Civil Procedure, that Malco (which meanwhile had changed its name to Hondo Oil and Gas Company and which therefore is also sometimes referred to as "Hondo") be added as a party defendant. In support of such motion, Continental

pointed out that if divestiture were ultimately granted, as prayed for, Continental should in equity be relieved of its heavy burdens under the refinery lease.[1] Hence, it was essential that Hondo, the lessor, be brought in as a party to this action.

Despite opposition by Appellant's counsel,[2] Continental's motion to bring in Hondo was granted by order entered on September 18, 1961. Therein, the Court found "that Hondo Oil and Gas Company is a necessary party defendant" and directed that it be joined as such a party. This was done. Neither on the present appeal, nor otherwise, has Appellant ever sought review or reversal of the District Court's order of September 18, 1961, making Hondo a party defendant.

After two years of intensive effort on the part of counsel on both sides, the issues in this case were narrowed and the essential facts were established through interrogatories, depositions, productions of documents, stipulations of fact, and stipulations authenticating the numerous pertinent documents. A huge record was thus compiled.

Based on that record, Continental moved in July 1963 for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both sides submitted voluminous briefs on the facts and the law.

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[1] At that time, the lease remained 90% executory and called for future payment by Continental of annual rentals totaling some $6.3 million, together with all taxes and special assessments levied against the leased property.

[2] Such opposition was diametrically contrary to the position taken by Appellant's lawyers only a few months earlier in *United States* v. *Pabst Brewing Co.*, 183 F. Supp. 220 (D.C. Wis. 1960).

On September 24, 1963, Judge ROGERS notified counsel as follows:

> "After a study of the pleadings, stipulations and exhibits, together with the very comprehensive briefs filed by both the Government and the defendants, the Court is constrained to grant the defendants' Motion for Summary Judgment."

Accordingly, final judgment was entered three days later, on September 27, 1963. The dismissal of the Complaint as to Continental, the lessee, necessarily brought about a dismissal in favor of Hondo, the lessor; and, since the granting of any relief against Hondo was wholly dependent upon the granting of relief against Continental, *the judgment of dismissal was non-severable.*

Late on the 60th and last day on which an appeal could be taken, Appellant filed its Notice of Appeal.[3] In violation of the requirement in paragraph 1 of Rule 33 of the Revised Rules of this Court, the Notice of Appeal was sent from Albuquerque, New Mexico, to Continental's counsel at Houston, Texas — a distance of about 800 miles — via regular mail, rather than by air mail. As a consequence, the Notice was not actually received until December 2, 1963.

Be that as it may, when the Notice of Appeal finally arrived, it revealed that Appellant's lawyers had deliberately dropped Hondo out of the case. This maneuver, as we shall demonstrate, has backfired, because it necessitates a dismissal of the present appeal.

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[3] The envelope transmitting the Notice of Appeal to counsel for Continental was postmarked 6:30 p.m., November 26, 1963.

I

ARGUMENT OF MOTION TO DISMISS

A. Hondo (formerly Malco) is a necessary and indispensable party to this cause

The whole purpose of this suit was to invalidate the refinery lease transaction of May 1, 1959, between Continental and Malco. The relief prayed for by Appellant was a judgment declaring the lease transaction unlawful and requiring Continental "to divest itself of all interest in and control over" the Malco refinery.[4]

---

[4] Appellant's prayer for relief, to the extent here material, reads as follows:

> "WHEREFORE, plaintiff prays:
>
> "1. That the acquisition by Continental . . . of the assets and business of Malco be adjudged to be in violation of Section 7 of the Clayton Act;
>
> "2. That . . . Continental be required to establish a new corporation and to transfer to said new corporation all of the business and assets acquired by Continental . . . from Malco; that Continental be specifically required to assign to said new corporation such rights as it acquired under that certain lease agreement of May 1, 1959, pertaining to . . . the refinery of Malco located at Artesia, New Mexico; and that Continental divest itself of all interest in or control over said new corporation . . . "

The relief sought is a determinative factor for purposes of ascertaining who are necessary or indispensable parties to an action. *Barney* v. *Baltimore*, 6 Wall. 280, 284 (1868); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235 (1902); *State of Washington* v. *United States*, 87 F. 2d 421, 426 (9th Cir. 1936); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 483, 485 (7th Cir. 1948); cert. den. 336 U.S. 945; *Young* v. *Powell*, 179 F. 2d 147, 151-152 (5th Cir. 1950); cert. den. 339 U.S. 948; *Baton* v. *Nona-Fletcher Mineral Co.*, 198 F. 2d 629, 631 (5th Cir. 1952); cert. den. 344 U.S. 864; *Pioche Mines Consol.* v. *Fidelity-Philadelphia Trust Co.*, 202 F. 2d 944, 948 (9th Cir. 1953); cert. den. 346 U.S. 899.

If any such relief were to be granted, equity and good conscience would dictate that Continental be relieved of its heavy obligations under the refinery lease, which now remains 75% executory and has 15 more years to run — until May 1, 1979. In addition to obligating Continental to pay future taxes levied against the refinery property, the lease calls for payment by Continental of future annual rentals totaling about $5 million. Under the circumstances, it would be wholly inequitable and unconscionable to force Continental to divest itself of the refinery and still keep Continental liable for millions of dollars in rentals and taxes on the very property which Continental would be forbidden to hold and enjoy.

Thus, the relief prayed for by Appellant would perforce require a cancellation or reformation of the Continental-Malco lease agreement of May 1, 1959. In order to grant any such relief, however, the court must have before it both parties to the lease — the lessor (Malco, now Hondo), as well as the lessee (Continental).

Legion are the reported cases which hold that in any action wherein a contract is sought to be cancelled or reformed, or wherein the validity of a contract is otherwise to be passed upon or affected, all parties to the contract are "necessary" or "indispensable" parties.

The leading case is *Shields* v. *Barrow*, 17 How. 130 (1855). This Court there pointed out that parties to a suit may be classified as "proper," "necessary" or "indispensable." The "necessary" parties were defined as follows (at p. 139):

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may . . . . finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it."

Then followed this classic definition and statement of the rule respecting "indispensable" parties (at pp. 139-140):

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.
>
> "A bill to rescind a contract affords an example of this kind. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition as to others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."[5]

East Tennessee, V. & G. R. Co. v. *Grayson*, 119 U.S. 240 (1886), involved a 20-year lease which the plaintiff

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[5] The *Shields* v. *Barrow* definitions of "necessary" and "indispensable" parties have been quoted or paraphrased in scores of subsequent cases. In addition to those cited in the text of this point A, see the following: *Barney* v. *Baltimore*, 6 Wall. 280, 284 (1868); *Williams* v. *Bankhead*, 19 Wall. 563, 571 (1874); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 249-251 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 235-236 (1902); *Garzot* v. *Rios de Rubio*, 209 U.S. 283, 297-298 (1908); *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 48-49 (1908); *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U.S. 77, 80 (1920); *Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U. S. 48, 52 (1954); *State of Washington* v. *United States*, 87 F. 2d 421, 425-426 (9th Cir. 1936); *Baird* v. *Peoples Bank & Trust Co.*, 120 F. 2d 1001, 1003 (3rd Cir. 1941); *Bry-Man's, Inc.* v. *Stute*, 312 F. 2d 585, 586-587 (5th Cir. 1963).

attacked without joining the lessor as a party to the suit — the precise situation we now have in the case at bar. This Court held (at p. 244):

> "The principal purpose of the suit is to set aside the lease for want of authority to make it. For that purpose both the lessor and the lessee are necessary parties."

In *Gregory* v. *Stetson*, 133 U.S. 579 (1890), this Court said (at p. 586):

> "In the case before us we are unable to see how any final decree could be rendered affecting the parties to the contract sued on without making them all parties to the suit. It is an elementary principle that a court cannot adjudicate directly upon a person's right without having him either actively or constructively before it. This principle is fundamental."

Lee v. *Lehigh Valley Coal Co.*, 267 U.S. 542 (1925), involved a suit brought by one of two lessors against the Coal Company lessee for construction of the lease. In an opinion by Mr. Justice HOLMES, this Court held (at p. 543) that the absent lessor "obviously . . . . was a 'necessary' even if not an indispensable party."

In *Roos* v. *Texas Co.*, 23 F. 2d 171 (2nd Cir. 1927); cert. den. 277 U.S. 589, Judge LEARNED HAND observed (23 F. 2d at p. 172):

> "Rescission of a contract, or declaration of its invalidity, as to some of the parties, but not as to others, is not generally permitted."

To the same effect: *Warfield* v. *Marks*, 190 F. 2d 178, 180 (5th Cir. 1951); cert. den. 343 U.S. 887; *Ward* v. *Deavers*, 203 F. 2d 72, 75 (D.C. Cir. 1953).

In *Von Herberg* v. *City of Seattle*, 27 F. 2d 457 (9th Cir. 1928); cert. den. 278 U.S. 644, the Court said (27 F. 2d at p. 461):

> "The object of that suit was the annulment of a contract between the city and the power company, and on principle and authority it would seem that both contracting parties were necessary parties to any suit having that object in view. . . .
>
> ". . . . the suit to annul the contract, whether brought against one or the other of the contracting parties, or against both, presented but a single issue, and there was in the nature of things no separable controversy as to each party."

The opinion in *Green* v. *Brophy*, 110 F. 2d 539 (D.C. Cir. 1940), was written by Judge (later Chief Justice) VINSON and included this statement of the rule (at pp. 541-542):

> ". . . . litigation requiring decision as to the legal consequences to be attached to a relationship where only one party thereto is made a party to the action is perhaps the clearest case of failure to join an indispensable party."

In *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946); cert. den. 329 U.S. 782; rehearing den. 329 U.S. 830, the Court said (157 F. 2d at p. 219):

> "The leasing contract was an entirety, and from its nature could not be cancelled as to the Calcotes and allowed to stand as to the other royalty owners."

In *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481 (7th Cir. 1948); cert. den. 336 U.S. 945, suit was brought for cancellation of a ground lease. Thompson, the lessor of part of the property on which a single building had been erected, was not joined in the action. The Court held (170 F. 2d at p. 486):

> "The interest of Thompson cannot be said to be distinct and severable from that of plaintiff. If plaintiff is successful in this litigation the interest of Thompson

> will be vitally affected. In the absence of Thompson a decree cannot be entered consistent with equity and good conscience.
>
> "It is our judgment that the Thompson interests are indispensable parties. . . ."

In *Hudson* v. *Newell*, 172 F. 2d 848 (5th Cir. 1949), the Court said (at p. 852):

> "We know of no exception to the rule that an instrument cannot be destroyed totally by a decree unless all parties to it . . . . are before the court."

To the same effect: *Young* v. *Powell*, 179 F. 2d 147, 151 (5th Cir. 1950); cert. den. 339 U.S. 948.

In *Interstate Commerce Commission* v. *Blue Diamond Products Co.*, 192 F. 2d 43 (8th Cir. 1951), a Federal regulatory agency was seeking an injunction which would have had the effect of nullifying leases and contracts with parties who were not parties to the suit. The Court held (at p. 47):

> "An injunction here against the defendant could only be granted on the theory that the various leases and contracts are void. Certainly these parties have a very substantial interest in that question and we conclude that they are indispensable parties."

In *Baten* v. *Nona-Fletcher Mineral Co.*, 198 F. 2d 629 (5th Cir. 1952); cert. den. 344 U.S. 864, the Court said (198 F. 2d at p. 631):

> "The primary relief sought — cancellation of the deeds — will, if granted, directly and injuriously affect the rights of the grantees in said deeds. These grantees are therefore indispensable parties. . . ."

In *Tucker* v. *National Linen Service Corp.*, 200 F. 2d 858 (5th Cir. 1953); cert. den. 346 U.S. 817, the Court said (200 F. 2d at p. 863):

"Whatever of uncertainty, of confusion, or of difficulty, may at any time have attended the statement of the principle of indispensability or its application to particular facts, one thing is clearly settled with respect thereto. This is that, where cancellation, reformation, or other equitable relief in respect of a contract or other instrument evidencing a right or a claim is sought, all of those having or asserting an interest in the contract or instrument, or who will be affected by the decree, are indispensable parties and must be before the court."

See, also:

Ribon v. *Chicago, R.I. & P.R. Co.*, 16 Wall. 446, 450 (1873);

Commonwealth Trust Co. v. *Smith*, 266 U.S. 152 (1924);

Arkansas Southeastern R. Co. v. *Union Sawmill Co.*, 154 Fed. 304, 310-311 (5th Cir. 1907);

South Penn Oil Co. v. *Miller*, 175 Fed. 729, 736 (4th Cir. 1909);

Vincent Oil Co. v. *Gulf Refining Co.*, 195 Fed. 434, 436-437 (5th Cir. 1912);

Associated Oil Co. v. *Miller*, 269 Fed. 16, 20-21 (5th Cir. 1920); cert. den. 256 U.S. 697;

Egyptian Novaculite Co. v. *Stevenson*, 8 F. 2d 576, 580-581 (8th Cir. 1925);

Flynn v. *Brooks*, 105 F. 2d 766, 767 (D.C. Cir. 1939);

Kentucky Natural Gas Corp. v. *Duggins*, 165 F. 2d 1011, 1015-1016 (6th Cir. 1948);

Lawrence v. *Sun Oil Co.*, 166 F. 2d 466, 469-470 (5th Cir. 1948);

Pioche Mines Consol. v. *Fidelity-Philadelphia Trust Co.*, 202 F. 2d 944, 947-948 (9th Cir. 1953); cert. den. 346 U.S. 899;

Brodsky v. *Perth Amboy National Bank*, 259 F. 2d 705, 707 (3rd Cir. 1958);

McShan v. *Sherrill*, 283 F. 2d 462, 464 (9th Cir. 1960).

Continental's motion to have Hondo joined as a party defendant in the case at bar was based upon Rule 19 of the Federal Rules of Civil Procedure. That Rule, entitled "Necessary Joinder of Parties," has been in effect since September 1938, but it was simply declaratory of the prior law, and hence effected no change in the requirements for joinder of "necessary" and "indispensable" parties. *Young* v. *Garrett*, 149 F. 2d 223, 228 (8th Cir. 1945); *Wesson* v. *Crain*, 165 F. 2d 6, 8 (8th Cir. 1948); *Metropolis Theatre Co.* v. *Barkhausen*, 170 F. 2d 481, 484 (7th Cir. 1948); cert. den. 336 U.S. 945; *Order of Railroad Tel.* v. *New Orleans, Texas & M.Ry. Co.*, 229 F. 2d 59, 67 (8th Cir. 1956); cert. den. 350 U.S. 997.

Subdivision (a) of Rule 19 requires joinder of "persons having a joint interest," and Subdivision (b) provides, in relevant part, as follows:

> "When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action."

Hondo was subject to the jurisdiction of the court below as to both service of process and venue and could be, and was, made a party to this action without depriving the

court of jurisdiction over Appellant and Continental. Accordingly, even if Hondo be regarded as merely a "necessary" party, rather than an "indispensable" one, its joinder herein, as ordered by the court below was mandatory. *United States* v. *Aetna Cas. & S. Co.*, 338 U.S. 366, 381-382 (1949); *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703, 707 (3rd Cir. 1940).

B. Nonjoinder of an available "necessary" party or of any "indispensable" party requires dismissal of the suit

Where a plaintiff fails or refuses to join an available "necessary" party or any "indispensable" party, the suit must be dismissed. Of the numerous Federal appellate cases so holding, the following are representative:

Ribon v. *Chicago, R.I. & P.R. Co.*, 16 Wall. 446 (1873), a suit to annul a sale of property, where this Court said (at p. 450):

> "The rule in equity as to parties defendant is, that all whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process . . . . the bill must be dismissed. Where a decree can be made as to those present, without affecting the rights of those who are absent, the court will proceed. But if the interests of those present and of those absent are inseparable, the obstacle is insuperable."

Williams v. *Bankhead*, 19 Wall. 563 (1874), where this Court said (at p. 571):

> "The general rule as to parties in chancery is, that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. . . . The true distinction appears to be as follows: First. Where a person will be directly affected by a decree, he is an indispensable party. . . . Second.

> Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached."

Swan Land & Cattle Co. v. *Frank*, 148 U.S. 603 (1893), where this Court announced (at p. 611):

> "The general rule that suits in equity cannot be entertained and decrees be rendered, when necessary or indispensable parties, whether corporations or individuals, are not brought before the court. . . ."

Minnesota v. *Northern Securities Co.*, 184 U.S. 199 (1902), where this Court said (at p. 235):

> "The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, *sua sponte*. . . ."

To the same effect: *Garzot* v. *Rios de Rubio*, 209 U.S. 283, 297 (1908).

Commonwealth Trust Co. v. *Smith*, 266 U.S. 152 (1924), where this Court affirmed a judgment of dismissal, saying (at p. 159):

> "But, as the bill was dismissed because of the refusal to bring in additional parties, the only question open here is whether the parties indicated were necessary parties. Of course they were, if they had such an interest in the matter in controversy that it could not be determined without either affecting that interest or leaving the interests of those who were before the court in a situation that might be embarrassing and inconsistent with equity."

To the same effect: *Interstate Commerce Commission* v. *Blue Diamond Products Co.*, 192 F. 2d 43, 46-47 (8th Cir. 1951).

Calcote v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946); cert. den. 329 U.S. 782; rehearing den. 329 U.S. 830, where the Court said (157 F. 2d at p. 225):

> ". . . . every indispensable party must be brought into court, actually or constructively, or the suit will be dismissed if a substantial claim is stated in the complaint."

Order of Railroad Tel. v. *New Orleans, Texas & M. Ry. Co.*, 229 F. 2d 59 (8th Cir. 1956); cert. den. 350 U.S. 997, where the Court held (229 F. 2d at p. 67):

> "We confine our decision on the question of necessary parties to the holding that the judgment of dismissal of the plaintiff's case was justified by the lack of indispensable parties defendant. . . ."

C. Failure to appeal as against a necessary or indispensable opposing party requires dismissal of the appeal

Judge (later Justice) VAN DEVANTER, writing for the Court in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. 344 (8th Cir. 1905) began his opinion with these observations (at p. 345):

> "The principle that a court cannot directly adjudicate the rights of a person who is not before it is fundamental (*Gregory* v. *Stetson*, 133 U.S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792), and is as applicable to courts exercising appellate jurisdiction as to those whose jurisdiction is original (*Terry* v. *Abraham*, 95 U.S. 38, 23 L. Ed. 794; *Davis* v. *Mercantile Co.*, 152 U.S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563. . . .)."

In *Davis* v. *Mercantile Trust Co.*, 152 U.S. 590 (1894), the appeal to this Court was taken from a decree foreclosing a mortgage, without joining the mortgagor. In dismissing the appeal for that reason, this Court said (at pp. 595-596):

> "Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees. . . .; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record — the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. . . . [W]hile the citation on its face runs to all the parties to the record, it was not served on the mortgagor . . . . and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. . . . [A]s that mortgagor was interested in and affected by the decree of foreclosure and sale it should have been made a party to this appeal and brought into this court, and because of the failure so to do the appeal cannot be maintained."

This conclusion is in consonance with the general rule that it is the duty of an appellate court to protect the interests of absent indispensable parties, even though the defect of parties was not raised in the court below. *Hooey* v. *Wilson*, 9 Wall. 501 (1870); *Flynn* v. *Brooks*, 105 F. 2d 766, 767-768 (D.C. Cir. 1939); *Brown* v. *Christman*, 126 F. 2d 525, 532 (D.C. Cir. 1942); *McShan* v. *Sherrill*, 283 F. 2d 462, 464 (9th Cir. 1960).

In a leading case on this subject, *Malsby* v. *Shipp*, 177 Ga. 54, 169 S.E. 308 (1933), the Supreme Court of Georgia dealt as follows with a situation strikingly similar to the one presented in the case at bar:

"1. All parties who are interested in sustaining the judgment of the court below, or who would be affected by a judgment of reversal, are indispensable parties in the Supreme Court. . . .

"2. Where an action is instituted seeking substantial relief against several defendants, and one of them files a demurrer which goes to the substance of the whole petition and challenges the plaintiff's right to any relief, a judgment sustaining such demurrer inures to the benefit of all the defendants, and they become interested in sustaining the judgment; and if the plaintiff desires to except to the ruling, it is essential that he make all of the defendants in the trial court defendants in error. . . .'

* * *

"4. In the present case, the plaintiff sought to obtain a money judgment and also an injunction against one of the defendants, called the main defendant, and prayed for injunction and other relief against other defendants; but it appeared from the allegations that the plaintiff could in no event be entitled to such injunctive relief against the other defendants, unless he had a cause of action against the 'main defendant.' The court sustained a general demurrer filed by that defendant, dismissing the petition as to him, and the plaintiff excepted but did not make the other defendants parties to the bill of exceptions. Held: All of the defendants in the court below against whom the plaintiff sought the writ of injunction were directly interested in sustaining the judgment complained of, and were indispensable parties in the Supreme Court; and, since these defendants were not made parties to the bill of exceptions, the writ of error must be dismissed."

D. By deliberately failing to appeal as against Hondo, Appellant not only dropped a necessary and indispensable party from the appeal but eliminated that party from all future proceedings in this case

The situation created by Appellant's strange appellate tactics in the case at bar is analagous to the situation involved in *Re Metropolitan Trust Co.*, 218 U.S. 312 (1910). There, the defendant trust company had successfully demurred to the complainant's bill and had accordingly been dismissed from the case. Later, after trial, a final decree of dismissal was entered in favor of the other defendants (167 Fed. 145). Complainant appealed from that decree, but not from the earlier one dismissing the trust company. The Circuit Court of Appeals reversed the judgment in favor of the other defendants on jurisdictional grounds and directed that the cause be remanded to the state court (176 Fed. 333). Thereafter, the complainant moved to vacate the dismissal which the trust company had won, so that it might be vouched back into the litigation as a defendant. The granting of such motion (180 Fed. 950) was held by this Court to be beyond the lower court's jurisdiction. Following are excerpts from this Court's opinion (218 U.S. at pp. 320-321):

> "When, after final decree dismissing the bill as against the other defendants, the complainant appealed to the circuit court of appeals, the decree in favor of the trust company was not brought before the appellate court for review, and the trust company was not a party to the appeal.
>
> "The decision of the circuit court of appeals, in reversing the final decree and in directing the remand

to the state court, was, of course, subject to the necessary limitation that it could apply only to the parties who had been brought before that court . . . .

". . . . After the term had expired, and after the complainant had exercised his right of appeal . . . . it was sought to set aside a decree which stood unreversed, and by which the trust company had been dismissed from the cause.

". . . . The reversal by the circuit court of appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less 'a judicial act, and within the scope of its jurisdiction and discretion'; and as that reversal and direction did not affect the trust company, the decree in its favor remained in full force."

So, in the case at bar, if there should now be a remand of this cause to the court below for further proceedings, it would seem that Hondo could not be brought back in as a party defendant. The judgment of dismissal in Hondo's favor would, under the doctrine of *Metropolitan Trust Co., supra*, stand "unreversed" (and perhaps unreversable) and hence would "remain in full force." Accordingly, Appellant's dropping Hondo out of this appeal — and hence out of this case — has produced the following intolerable consequences:

First: Appellant's maneuver has nullified the District Court's order of September 18, 1961, which correctly held Hondo to be a necessary party defendant in this action. Such nullification amounted to reversal of the District Court's order without appealing therefrom and without judicial sanction of any kind. Appellant's lawyers simply took the law into their own hands and eased Hondo out

of the case, in contravention of all the applicable authorities and also in defiance of the explicit order of the court below.[6]

A second consequence of Appellant's unique procedural experiment is that the District Court has thereby been stripped of the discretionary authority it would otherwise possess to frame a fair and equitable judgment of divestiture.[7] Ordinarily, in the framing of equitable decrees in antitrust actions, the District Courts are clothed "with

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[6] Why Appellant's lawyers have from the outset been opposed to Hondo's joinder in this case remains a mystery. Their position here is just the opposite of that taken by them in *United States v. Pabst Brewing Co.*, 183 F. Supp. 220 (D.C., Wis. 1960). There, the seliers of assets were joined as original parties defendant, along with the purchaser, in a divestiture suit brought under Sec. 7 of the Clayton Act. When the seller-defendants moved to be dropped from the case, Appellant's lawyers succeeded in defeating the motion and in persuading the Court to rule as follows (at pp. 221-222):

> "The Government concedes that the movants have been charged with no offense, but contends that they are proper parties to this proceeding for the purposes of relief.
>
> "In a proceeding under § 7 of the Clayton Act, the court has authority to grant relief not only against parties who are found to have violated that section, but also against other parties if such relief is necessary to eliminate the effect of an acquisition offensive to the statute . . . All parties against whom relief may be granted may properly be joined as parties defendant.
>
> ". . . Because of the movants' close connection with the transaction here complained of, it is our opinion that, should the plaintiff prevail, some relief might be granted against them, and that they should be retained as parties pending determination of the relief, if any, to be granted."

[7] Assuming — but of course not conceding — that such a judgment can somehow be justified in this case. As we show in support of our alternative motion to affirm (*infra*, pp. 25 et seq.), this action is completely lacking in merit and the judgment of dismissal entered in the court below was eminently correct.

large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947); *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586, 607-608 (1957). But the exercise of such "large discretion" in the case at bar has now been frustrated. In the absence of Hondo, its interest may not be adversely affected by the final decree herein, because "no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." *Mallow* v. *Hinde*, 12 Wheat. 193, 198 (1827); *Shields* v. *Barrow*, 17 How. 130, 141 (1855); *Barney* v. *Baltimore*, 6 Wall. 280, 285-286 (1868); *Gregory* v. *Stetson*, 133 U.S. 579, 586 (1890); *California* v. *Southern Pacific Co.*, 157 U.S. 229, 249 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U.S. 199, 237 (1902); *Bogart* v. *Southern Pacific Co.*, 228 U.S. 137, 146 (1913). At the same time, no just and reasonable decree of divestiture can be entered herein unless it *does* adversely affect Hondo's interest by cancelling or reforming the refinery lease agreement. Otherwise, Continental would be ousted from possession and enjoyment of the Malco refinery, but would still remain liable, as lessee, for millions of dollars in rentals and taxes upon the divested refinery property. Thus, Appellant's dropping of Hondo has deprived the District Court of authority and discretion to decree divestiture — the only relief specifically prayed for — "without either affecting that interest [of the absent Hondo], or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields* v. *Barrow*, *supra*, 17 How. at p. 139.

A third consequence — and likely the intended one — is that Continental is exposed to unmerciful amercement. A decree of divestiture, with no protection against Hondo's

claims under the refinery lease, would place Continental at a tremendous disadvantage. Continental could not then safely obey the decree. Moreover, further litigation between Continental and Hondo would be necessary in order to determine the extent of Continental's liability, if any, under the refinery lease after forced divestiture of the property.

The rule requiring joinder of necessary and indispensable parties is designed to prevent just such shockingly inequitable conditions. In *California* v. *Southern Pacific Co.*, 157 U.S. 229 (1895), this Court approved the following statement of the reasons for the rule (at p. 251):

> "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, *so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation.* For this purpose all persons materially interested in the subject, ought generally . . . . to be made parties to the suit . . . ." (emphasis added)

To the same effect: *Arkansas Southeastern R. Co.* v. *Union Sawmill Co.*, 154 Fed. 304, 311 (5th Cir. 1907); *Vincent Oil Co.* v. *Gulf Refining Co.*, 195 Fed. 434, 436 (5th Cir. 1912).

The half-appeal Appellant has attempted here is not simply unauthorized by statute or rule of court; it clearly disobeys the District Court's order requiring the joinder of Hondo and disregards the basic principles of equity making such joinder mandatory. By deliberately failing to appeal as against Hondo, Appellant has intentionally eliminated a necessary and indispensable party, in whose absence further proceedings in this case would be futile. The appeal must, therefore, be dismissed.

II

ARGUMENT OF MOTION TO AFFIRM

A. There was but one, simple issue in the case

To the extent applicable here, Section 7 of the Clayton Act (15 U.S. Code § 18) reads as follows:

> ". . . . no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly."

Six of the seven ultimate issues arising in this case under the foregoing statutory language were resolved, either by concession of the parties or by Judge ROGERS' rulings in the Order on Pre-Trial Hearing, entered July 17, 1963. Thus:

1. Beyond question, Continental and Malco were corporations, the first subject to FTC jurisdiction and the second engaged also in commerce.

2. Continental conceded that its 20-year lease of the Malco refinery, with an option to purchase it at the end of the lease terms, constituted an "acquisition."

3. The Government conceded that Continental's taking over of a lease on one service station at Roswell, New Mexico — the only retail outlet controlled or operated by Malco — was *de minimis*, and that no issue was raised in regard to the acquisition of that single service station (Pre-Trial Tr. pp. 20, 27).[5]

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[5] The reference on page 4 of Appellant's Jurisdictional Statement to Continental's purchase of "marketing facilities" is therefore quite misleading. The only "marketing facilities" Continental acquired from Malco consisted of the one service station at Roswell; and that acquisition was concededly *de minimis*.

4. Although the Amended Complaint made both gasoline and crude oil "lines of commerce" involved here, the averments respecting crude oil turned out to be completely unfounded. The parties therefore stipulated "that any and all issues tendered by the pleadings herein with respect to crude oil as a line of commerce are hereby eliminated from this case" (Stipulation Narrowing Issues, dated December 20, 1962; Pre-Trial Tr. pp. 9, 19-20, 37). That left *gasoline* as the sole "line of commerce" to be considered, as both sides agreed (Pre-Trial Tr. pp. 9, 14, 24).

5. The "section of the country" (also referred to as the "relevant geographic market" or the "relevant market area") was the main topic of debate at the pre-trial hearing on July 10 and 11, 1963. The Government adhered to the position taken in its Amended Complaint — that the "relevant geographic market" should be confined to the political boundaries of New Mexico.[9] The undisputed facts of record, however, established that sizeable volumes of gasoline manufactured at the Malco refinery at Artesia, New Mexico, were shipped to, and distributed in, Arizona and El Paso County, Texas. (See Pre-Trial Tr. pp. 20-26, 32-35.) Accordingly, Judge Rogers properly concluded, and held, that for purposes of this cause the "relevant market area" should include El Paso County and most of Arizona, as well as New Mexico (Pre-Trial Tr. pp. 93-94, 102-103; Order on Pre-Trial Hearing, par. (1)).

6. The Government never contended that Continental's acquisition of the Malco refinery could conceivably "tend to create a monopoly." (See Pre-Trial Tr. p. 18.)

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[9] In taking this stand, the Government's obvious motive was simply to blow up and distort Continental's and Malco's relative refining and marketing percentages. (See Pre-Trial Tr. pp. 25-26.) Such percentages for the entire relevant market area were miniscule; and, as we shall later show (*post*, pp. 26-28), such percentages for New Mexico alone were themselves far too small to signify any "*substantial* lessening of competition."

7. Thus, the one basic, ultimate issue left open for determination in this case was whether Continental's "acquisition of the assets of Malco Refineries, Inc., in May of 1959, including the manufacturing facility at Artesia, New Mexico, the name 'Malco,' and the good will of Malco . . . . may constitute a substantial lessening of competition in the relevant market" (Order on Pre-Trial Hearing, par (3)).[10]

B. The essential allegations of the Amended Complaint were proved false by undisputed facts of record

The evidentiary record in this case was developed, through the cooperative efforts of counsel on both sides over a period of 21 months, in the following ways:

— Appellant propounded two sets of searching interrogatories, which Continental answered in detail.

— At Appellant's instance, oral depositions were taken of eight witnesses, the transcripts of whose testimony covers approximately 750 pages.[11]

— Four stipulations of fact were entered into, comprising some 80 pages of statistical and other pertinent information.

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[10] Appellant's Jurisdictional Statement characterizes the action at bar as "a complicated antitrust case" (p. 8), "presenting involved and complicated issues of fact and law" (p. 19). But Appellant's trial counsel assured the court below that "in this case, I believe we have a relatively simple case in that we don't have a great number of products involved" (Pre-Trial Tr. p. 9), and that, because so many facts had been stipulated, "our issues are going to be more limited" (Id. p. 17).

[11] The witnesses consisted of the president, the vice president and the former sales manager of Malco (the latter having since May 1, 1959, continued to supervise all sales to Malco customers as president of Continental's subsidiary, Malco Products, Inc.) and two vice presidents and three other key officials of Continental.

— There were produced from the files of Malco and Continental a total of 141 documents (several of them quite voluminous) pertaining to the matters in suit. Two stipulations were entered into authenticating these documents and assigning exhibit numbers to them.

The facts so made of record were undisputed and, indeed, indisputable. Moreover, they made the granting of Continental's motion for summary judgment inevitable, for they demolished every allegation in the Amended Complaint which was essential to the sustaining of Appellant's cause of action. Set forth below are summaries of those allegations and of the undisputed facts which disproved them.

1. *Refinery capacities*

Allegations: In 1959 Continental's refinery at Artesia, with an input capacity of 4,000 barrels per day, represented 13% of the total refining capacity in New Mexico, and Malco's Artesia refinery with a capacity of 12,000 barrels daily, represented 40% of such total. (Am. Comp. par. 14)[12] Thus, the impression was sought to be created that by acquiring the Malco refinery, Continental became the dominant refiner serving the New Mexico market.

Undisputed Facts: Continental's little Artesia refinery was old and obsolete and had reached a point where it would soon have to be shut down (ID 4, memo. p. 2; ID 6, pp. 1, 2; Liddell Dep. pp. 9-10, 12-13, 163-164, 175; Sullivan Dep. p. 11; Lovejoy Dep. pp. 64-65). At least 18 refineries, having an aggregate input capacity of approximately 300,000 barrels a day, were supplying New Mexico, and over 30 refineries, with almost 1,075,000 barrels of daily capacity,

[12] These same meaningless and misleading percentages are repeated on page 4 of Appellant's Jurisdictional Statement.

were supplying the relevant market area (1st Stip. of Facts, pars. 2(a), 2(b), 2(c)). Accordingly, Continental's 4,000-barrel plant at Artesia represented 1.84% of the total refining capacity serving New Mexico and only 0.37% of such capacity feeding into the relevant market area. By the same token, Malco's 11,500-barrel plant (the correct figure) represented 3.84% of the refining capacity supplying New Mexico and but 1.07% of such capacity serving the relevant market area.[13]

2. *So-called "market shares"*

Allegations: In 1958, Continental's sales of gasoline to be marketed in New Mexico under the "Conoco" brand equaled about 10% of the total gasoline consumption in that State (Am. Comp. pars. 15, 16). The 1958 Malco sales of gasoline to be marketed in New Mexico under the "Malco" brand equaled about 11.5% of the total State consumption (Am. Comp. par. 18).

Undisputed Facts: The actual 1958 percentages of total consumption marketed under the "Conoco" and "Malco" brands were as follows:

Area	"Conoco"	"Malco"
New Mexico	9.63	6.20
Arizona	0.29	3.04
El Paso Co., Texas	2.66	3.12
Relevant Market	4.30	4.30

(1st Stip. of Facts pars. 1, 10, 12, 19)

[13] In *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), the manufacturing facilities involved represented less than 0.5% for Kinney and about 4% for Brown (370 U.S. at pp. 298, 303). The Government took no appeal from the District Court's finding "that the merger of Brown's and Kinney's *manufacturing* facilities was economically too insignificant to come within the prohibitions of the Clayton Act" (370 U.S. at p. 335).

In truth, however, Malco possessed no measurable "share" of the gasoline market in any of the areas above listed. Malco sold virtually all of its gasoline f.o.b. its Artesia refinery (1st Stip. of Facts, par. 14). Having no supply contracts with any of its customers, Malco could not, and did not, exercise any control over the disposition of the gasoline so sold or over the outlets through which such gasoline was marketed (Lackey Dep. p. 24; Copple Dep. pp. 10, 13-14, 41; ID 96, p. 3). Aside, therefore, from the relatively insignificant gallonage dispensed through its solitary service station at Roswell, Malco had no "market share" whatever.

3. *"Malco" jobbers and retail outlets*

Allegations: In 1958, gasoline sold by Malco in New Mexico went to more than 50 jobbers who, in turn, sold the product to more than 200 service stations for resale to the public (Am. Comp. pars. 19, 21).

Undisputed Facts: At the time of the refinery lease transaction of May 1, 1959, Malco's regular jobber customers comprised 39 in New Mexico, 3 in Arizona, and 1 in El Paso County, Texas, and those jobbers operated or supplied a total of 109 retail outlets in New Mexico, 64 in Arizona, and 4 in El Paso County (1st Stip. of Facts, par. 18).

4. *Retail prices for "Conoco" gasoline*

Allegations: Most service stations (187 out of 233) handling "Conoco" gasoline in New Mexico purchased such gasoline from Continental under contracts which compelled the retailing of the product "at prices determined by Continental"; and those prices "were the same as the

retail prices at which other "majors" brands of gasoline were being sold in competing stations" (Am. Comp. pars. 16, 17).[14]

Undisputed Facts: The contracts allegedly enabling Continental to control the retail price of gasoline were pure fiction; no such contracts existed. (See ID 1; ID 97, IDs 102-109.) The retail prices of both "major" and "independent" brands of gasoline varied from station to station and fluctuated from time to time, depending upon local competitive conditions and individual retailers' postings (Liddell Dep. pp. 52-53; Swanson Dep. pp. 16-18, 21-22; Frost Dep. pp. 19-26; Sullivan Dep. pp. 48, 52, 54, 76-77; Copple Dep. pp. 36-40, 59-61, 72-73, 87; IDs 91, 110-141; Answers to Interrogatories (1st Set) Nos. 18, 19(d)).

5. *Dependence of "Malco" jobbers and service stations on Malco refinery as supply source*

Allegations: Malco's New Mexico jobbers, and the service stations buying from those jobbers, "depended on Malco as a source of supply of gasoline to enable them to continue in business and to compete with the distributors and service stations handling gasoline under brand names of major oil companies, including defendant 'Continental'" (Am. Comp. par. 21).

Undisputed Facts: Malco had no supply contracts with any of its gasoline customers (Lackey Dep. pp. 21, 64, 134-135; Copple Dep. p. 17; ID 26, p. 1; ID 96, p. 3). They were free to, and frequently did, buy their gasoline requirements from other refineries (1st Stip. of Facts, par.

[14] Five other "major" brands were alleged (Am. Comp. par. 17). Actually, there were 11 other "majors" and 12 other integrated oil companies marketing in New Mexico in 1958 (1st Stip. of Facts par. 7(a)), not to mention numerous additional such marketers in Arizona and El Paso County (See 1st Stip. of Facts par. 7(b), 7(c)).

18, notes (2), (4), (6), (7), (8), (10), (11), (12), (16), (18), (19), (23)). Practically all of the refineries supplying gasoline consumed in New Mexico were willing to, and did, sell to jobbers and dealers who retailed gasoline under brand names other than those of "major" companies (1st Stip. par. 2(d)). The same is true of available gasoline supplies in Arizona and El Paso County, Texas (1st Stip. of Facts pars. 2(e), 2(f)).

6. *Consequences of Continental's leasing of the Malco refinery*

Allegations: The refinery lease transaction of May 1, 1959, had the following, among other, consequences (Am. Comp. par. 23):

> "(c) Actual or potential elimination of fifty independent jobbers and distributors and more than two hundred service stations in New Mexico whose prices for gasoline have been lower than the prices charged by distributors and service stations handling major branded gasoline."
>
> "(h) An increase in the control by major oil companies over the marketing and prices of gasoline in New Mexico by elimination of the largest independent refiner and marketer[15] in said State and the largest source of supply of gasoline sold at 'cut rate' service stations in New Mexico."

Undisputed Facts: Since May 1, 1959, Continental has, through its subsidiary, Malco Products, Inc., continued to supply all of the former customers of Malco Refineries, Inc., who wished to continue buying gasoline from the refinery at Artesia for resale under the "Malco" name and

[15] Malco was *not* "the largest independent . . . marketer" in New Mexico. Its only marketing operation consisted of a single service station at Roswell (Lackey Dep. pp. 22, 23, 38, 39, 40, 106; Copple Dep. p. 10; HD 24, pp. 3, 4, 5; HD 31, pp. 3-4; HD 79, pp. 1, 5, 10; HD 96, p. 3); and Continental's acquisition of that one service station was conceded by the Government to be *de minimis* (Pre-Trial Tr. pp. 20, 27).

has also begun supplying several new customers of the same type (1st Stip. of Facts, par. 18). The gasoline output of the combined Continental and Maico refineries at Artesia greatly exceeds Continental's own requirements; hence, Continental is under continuing economic compulsion to keep on supplying "Maico" jobbers and distributors for the foreseeable future. (See Part VI (pp. 85-99) of the Appendix to Continental's Brief in court below.) The implication, that Continental was engaged in some sort of gigantic conspiracy with other "major" oil companies to control gasoline marketing and prices and to wipe out "price cutters," turned out to be sheer fantasy — another figment of the fertile imagination of the draftsman of the Government's pleading.

Thus, in the light of the undisputed facts of record, Appellant's whole case was seen to be based on a mistaken theory, and the essential averments of the Amended Complaint were exposed, one and all, as either greatly exaggerated or entirely fictitious. There was no possibility that Appellant could sustain the cause of action it had pleaded. It followed that Continental was "entitled to a judgment as a matter of law." Rule 56(c) of the Federal Rules of Civil Procedure.

C. No genuine issue as to any material fact remained to be tried

In its Jurisdictional Statement (pp. 2, 9-17) Appellant contends that the following four "issues" were in dispute:

> "(1) whether the State of New Mexico constituted a relevant submarket;
>
> (2) whether the two companies were in competition prior to the acquisition;

(3) whether the acquiring company had engaged in anticompetitive conduct following the acquisition; and

(4) whether there were mitigating circumstances which justified the acquisition."

As to each of these four issues, however, there was either no genuine issue as to the facts, or the issue was not material to the fundamental question: whether Appellant could sustain the fanciful cause of action it had pleaded.

1. *Whether New Mexico was a relevant submarket*

The Amended Complaint alleged that the State of New Mexico constituted the entire relevant market area. But the undisputed facts showed that the gasoline output of the Malco refinery was not distributed in New Mexico alone; that substantial volumes of such output also went to Arizona and El Paso County, Texas. Accordingly, Judge Rogers correctly held that those two additional areas should be included. This had the effect of minimizing still further the grossly inflated percentage figures Appellant had erroneously pleaded.

There could be no genuine dispute between the parties as to what the actual percentage figures were. Computation of such figures was a matter of simple arithmetic, inasmuch as the refinery capacities and the gasoline consumption and sales volumes had all been stipulated.

The only question, then, was whether a shrinking of the relevant market area would so materially change the percentages as to compel a finding that there had been a *substantial* lessening of competition. The percentages in question have already been stated (*ante*, p. 27). Manifestly, the question of substantiality could not turn on

whether Continental acquired 3.8% of the refining capacity serving New Mexico or 1.07% of such capacity serving the entire relevant market area.

Nor could the outcome here depend on whether retail sales of gasoline under the "Malco" brand represented 6.2% of total consumption in New Mexico or 4.3% of consumption in the whole relevant market. The exact size of the so-called "market share" percentages at the retail level is especially immaterial in this case, because Continental acquired control over only one retail outlet — an aspect of the transaction in suit so trivial that the Government conceded it to be *de minimis*. The situation at bar is entirely different from that involved in *Brown Shoe*, where the principal assets acquired consisted of over 400 *controlled* retail outlets (370 U.S. at pp. 303, 345). Here, Continental acquired only a lease on Malco's manufacturing facility at Artesia, a lease on Malco's solitary service station at Roswell, and Malco's trade marks and good will. Since none of Malco's gasoline customers were tied to it by contract, the item of "good will" represented simply an opportunity to solicit those customers' continuing business on a spot-purchase basis. Continental thereby gained neither controlled outlets nor an assured share of any gasoline market.

2. *Whether Continental and Malco were in competition prior to the acquisition*

The record in this case establishes conclusively that prior to May 1, 1959, there was no *substantial* competition between the parties to the refinery lease transaction. The absence of such competition necessarily resulted from the fact that Continental and Malco respectively sold most of their gasoline at different levels of wholesale distribution, largely to different types of wholesale customers.

(See Appendix to Continental Brief in court below, pp. 14-22, 72-76.) Perhaps the most cogent proof of the absence of any such competition is the further undisputed fact that during the entire 17-year span of Malco's participation in the petroleum refining business, there was not a single instance where a Malco customer switched to Continental or a Continental customer switched to Malco for gasoline supplies (Lackey Dep. pp. 31-32, 79).

Unable to show any actual competition of a substantial nature between Continental and Malco as corporate entities, the Government contends that there was bound to be competition between their customers; that "Malco" retail outlets were competing with "Conoco" retail outlets for the motorist's trade.[16] This contention might have some validity if, as in *Brown Shoe* (370 U.S. 294), Continental had acquired retail outlets. Here, however, the only asset that Continental acquired — aside from the one, concededly *de minimis*, Malco service station at Roswell — was the Malco manufacturing plant at Artesia. Such acquisition of refining facilities did not adversely affect the competition offered by "Malco" retail outlets, none of which Continental owned, operated or controlled in any way.

The record further conclusively shows that any competition there may have been between "Malco" and "Conoco" retail outlets prior to May 1, 1959, has persisted ever since. Between the acquisition date and the end of 1961, the number of "Malco" retail outlets in operation increased from 176 to 203 (1st Stip. of Facts, par. 17, p. 50). Total gasoline

[16] As shown in the Appendix to Continental's Brief in the court below (pp. 78-83), the record would sustain a finding that such competition at the retail level was far from "substantial." For present purposes, however, we need not go into that question.

sales to "Malco" customers were 7.7 million gallons greater in 1961 than they had been in 1958 — an increase of 8.5% (1st Stip. of Facts, pars. 10, 11).

3. *Whether Continental engaged in "anti-competitive conduct" after the acquisition*

There was no such "issue" in this case until Continental moved for summary judgment. Appellant's lawyers thereupon invented this new "issue," and injected it into the case by means of some remarkable affidavits.[17] Continental submitted no counter affidavits, because the new "issue" was, on its face, completely immaterial.

If, as the Government belatedly claims (and we vehemently deny), Continental engaged in "anticompetitive conduct" several years after the refinery lease transaction was concluded, that may form a basis for some other litigation; but it could not justify divestiture of the Malco refinery, which was the only specific relief sought by Appellant.

4. *Whether there were mitigating circumstances which justified the acquisition*

Clearly present in the case at bar were several "mitigating factors" (see Appendix to Continental's Brief in court below, pp. 26-71) which this Court found wanting in *Brown Shoe* (370 U.S. at p. 346).

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[17] The Jurisdictional Statement discreetly fails to mention that affiant Chamberlain is a "Malco" jobber at Phoenix, Arizona — outside the relevant market area Appellant urges as the proper one for purposes of this case. Affiants O'Reilly and Somerville, attorneys herein for the Government, apparently failed to realize that second- and third-hand hearsay, about what unidentified people were understood to have said when interviewed, is inadmissible as evidence of anything. *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522, 525 (2nd Cir. 1956); Federal Rules of Civil Procedure, Rule 56(e), as amended effective July 1, 1963.

However, the granting of summary judgment here did not depend on any issue respecting "mitigating factors." Such an issue would become material only if Appellant were able to make out a *prima facie* case; and that was manifestly impossible in the face of the undisputed facts of record. (See *ante*, pp. 25-31.) Rebuttal to an affirmative defense could not cure Appellant's complete inability to sustain its own alleged cause of action.

As Judge ROGERS put it in his notice to counsel on September 24, 1963:

> "It may well be that there remains in the case certain disputed issues of fact, but I do not feel they are material, and even if found in the Plaintiff's favor, it would avail them nothing."

D. Summary judgment may properly be granted in a case such as this

In *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), this Court said (at. p. 259):

> "Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, they are not appropriate 'where motive and intent play leading roles'[18]. Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial."

[18] In the *Poller* case, the five majority members of this Court stated: "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot" (368 U.S. at p. 473). The four dissenting Justices pointed out, however, that Federal Rule of Civil Procedure 56(c) "does not indicate that it is to be used any more 'sparingly' in antitrust litigation (*ante*, p. 473) than in other kinds of litigation, or that its employment in antitrust cases is subject to more stringent criteria than in others" (368 U.S. at p. 478).

As we have shown, the case at bar was a relatively simple one. No conspiracy was involved; Appellant's claim did not hinge on motive or intent; there was no "plot" to "thicken". The proof consisted primarily of stipulated facts and concededly genuine documents. Under these circumstances, a final determination by summary judgment was entirely appropriate and proper. *Associated Press* v. *United States*, 326 U.S. 1, 5-6 (1945); *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 86-87 (1950); *United States* v. *Krasnov*, 355 U.S. 5 (1959), affirming 143 F. Supp. 184 (D.C. Pa. 1956); rehearing den. 355 U.S. 908; *Gold Fuel Oil Service, Inc.* v. *Esso Standard Oil Co.*, 195 F. Supp. 85 (D.C. N.J. 1961); aff'd 306 F. 2d 61 (3rd Cir. 1962); cert. den. 371 U.S. 951 (1963).

In the *Krasnov* case, *supra*, the Court said (143 F. Supp. at p. 196):

> "The Government has established by the introduction of *documentary evidence* all of the facts necessary to establish its claim. The correctness and authenticity of each document . . . . have been admitted by at least one of the defendants involved in this action . . . . The documents cover the entire period of operation, were made concurrently with the events which they purport to portray and, since they are *genuine documents*, no issue of fact can arise with respect to any particular document which might in anywise cast doubt upon or weaken the effect of other documents."

In Fox v. Johnson & Wimsatt, 127 F. 2d 729 (D.C. Cir. 1942), a private antitrust suit, the Court said (at p. 737):

> "Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court."

In *United States* v. *General Instrument Corp.*, 87 F. Supp. 157 (D.C. N.J. 1949), the parties to an antitrust case entered into stipulations of fact and defendants admitted the authenticity of all of plaintiff's exhibits. In disposing of motions and counter-motions for summary judgment, the District Judge proceeded on this premise (at p. 165):

> "The facts determined, a court is not precluded from adjudicating the legal consequences to be drawn from undisputed facts."

In *Marion County Co-op. Ass'n* v. *Carnation Co.*, 114 F. Supp. 58 (D.C. Ark. 1953); aff'd 214 F. 2d 557 (8th Cir. 1954), the District Court granted summary judgment for the defendant in a private antitrust case, and in so doing made the following observations applicable to the case at bar (114 F. Supp. at p. 65):

> "A Court should be careful not to deprive a party of his day in court, but if the material before the Court discloses clearly that the issues are sham, frivolous, or so unsubstantial that it would obviously be futile to try such issues, then a summary judgment should be entered. In such a case, there would be no genuine issue of fact and the movant would be entitled to a judgment as a matter of law."

In *United States* v. *L. D. Caulk Co.*, 126 F. Supp. 693 (D.C. Del. 1954), the Court granted defendant's motion for summary judgment, aptly saying (at p. 696):

> "It is clear and admitted that an antitrust case is an appropriate proceeding for the application of summary judgment proceedings where the parties have stipulated the facts and the documents on which they respectively rely."

See also: *United States* v. *Celanese Corp. of America*, 91 F. Supp. 14, 17-18 (D.C. S.D. N.Y. 1950); *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, 27 F.R.D. 468, 470 (D.C. S.D. N.Y. 1961); *Bond Distributing Co.* v. *Carling Brewing Co.*, 32 F.R.D. 409, 415 (D.C. Md. 1963).

E. Findings of fact and conclusions of law in the court below were not only unnecessary but would have been ill-advised

Appellant's Jurisdictional Statement repeatedly points out (pp. 2, 8, 20) that no findings of fact and conclusions of law were entered in the District Court. The absence of such findings and conclusions, argues Appellant, "affords an added reason why the judgment below should be reversed" (p. 21). That argument represents one more blunder the Government has made in this case.

Rule 52(a) of the Federal Rules of Civil Procedure specifically provides that findings of fact and conclusions of law are unnecessary when summary judgment is granted under Rule 56. Failure to make and enter such findings in connection with a summary judgment is not error. *Lindsey* v. *Leavy*, 149 F. 2d 899, 902 (9th Cir. 1945); cert. den. 326 U.S. 783; *Simpson Bros.* v. *District of Columbia*, 179 F. 2d 430, 434 (D.C. Cir. 1949); cert. den. 338 U.S. 911. Indeed, when summary judgment is rendered, findings are an anachronism. "Sometimes such findings serve as a good summary; other times they are just a nuisance and cause trouble." *Dana Perfumes, Inc.* v. *Mullica*, 268 F. 2d 936, 937 (9th Cir. 1959). As stated in the latest appellate decision on this subject, *A R Inc.* v. *Electro-Voice, Incorporated*, 311 F. 2d 508, 513 (7th Cir. 1962):

> "Rule 52(a) expressly exempts decisions on motions for summary judgment from its provisions. Such specific findings and separate conclusions were not re-

quired to be stated. Where, as here, no genuine material factual issue is presented it would be ill-advised to make specific findings and separate conclusions. They would carry an unwarranted implication that a fact question was presented."

CONCLUSION

This appeal should be dismissed, or, in the alternative, the judgment appealed from should be affirmed.

Respectfully submitted,

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